



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HCCR NO.68 OF 2002**

*(From the original conviction and sentence in Criminal Case No.355 of 2001 in the Principal Magistrate's Court at Kerugoya by W. N. Njage – P.M.)*

**BENSON MURIUKI RUKUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

*Benson Muriuki Rukui* hereinafter referred to as the Appellant was tried and convicted by the Principal Magistrate Kerugoya for the offence of stealing by servant contrary to section 281 of the Penal Code. He was sentenced to serve five years imprisonment. He has now appealed against his conviction and sentence citing five grounds of appeal as per the Amended petition of appeal dated 11th February 2002.

The particulars of the offence against the Appellant were that on diverse dates between 5th and 10th January 2001 at Gichugu Farmers Sacco in Kirinyagah District being a servant to Gichugu Farmers Sacco, He stole Ksh.201,135/= from his said employer.

Four witnesses testified in proof of the prosecution's case. Their evidence was as follows:-

The Appellant was at the material time employed by Gichugu Farmers Sacco (hereinafter referred to as complainant) as a cashier.

On 4/1/01 P. W. 1 Evanson Ndambiri Gachewa, P. W. 2 Peterson Gachoki Wakabari and P. W. 3 Michael Gitari Njagi who are the Chairman, Secretary-Manager and Treasurer respectively, of the Complainant signed a cheque for withdrawal of Ksh.200,000/= from the Complainant's Account at Co-operative Bank Kerugoya.

The money was handed over to the Appellant who signed for it in the Standard Analysis Book. On 10th January 2001, the Appellant asked for permission to go to Hospital. He went away with the key to the safe. The Appellant did not go back to work despite messages and letters sent to him. On 2/2/01 a letter of suspension was written to him asking him to surrender all documents and keys to the office. The Appellant did not however surrender the items.

The matter was reported to the police. On 7th February 2001, the Appellant was arrested. He was subsequently escorted to his office where He opened the safe and upon checking Ksh.200,133/= was found missing. The Appellant could not account for the money and was therefore charged with this offence.

In his defence the Appellant denied having stolen any money from his employer. He explained that He was given permission by the Manager to be away as He was sick. He gave one Janet Gathua Ksh.125,000/= from his safe and left Ksh.75,000/= in his office desk. He left Janet with keys to his office and keys to the Cash-Box. On 11th January 2001, He sent one David Kinyua with one set of keys for his office desk with a note to the Manager to open the office desk. He later learnt from the Manager that He had a shortage of Ksh.2,000/=. He denied having stolen the amount claimed of Ksh.201,000/= and claimed He only had a shortage of Ksh.2,400/=.

The trial Magistrate having considered the evidence found that the Appellant stole Ksh.201,133/= from his employer He accordingly rejected his defence, found him guilty and convicted him of the charge.

I have re-considered and re-evaluated all the evidence. It is clear that the Appellant received Ksh.200,000/= on 4th January 2001. The Appellant did in fact admit this though He explained that He gave Ksh.125,000/= to one Janet and left Ksh.75,000/= in his desk drawer He did initially indicate that He would call Janet as his witness. The case was adjourned twice to enable the Appellant prepare for his defence and call his witnesses.

Finally when the Appellant testified He claimed Janet had refused to attend court. He therefore opted to close his defence without calling any witness. No effort was made to obtain court summons to compel the attendance of Janet Gathua since her evidence was so crucial to the defence. The Appellant was represented by an advocate and could have obtained the court summons if indeed they felt the need. The claim that the trial Magistrate shifted the burden of proof from the prosecution to the Appellant has no substance as it was the Appellant who having admitted receipt of the money claimed to have given part of it to Janet and had therefore to convince the court of this fact. The trial Magistrate who saw and observed the demeanour of the Appellant was not persuaded by this line of defence and believed it was afterthought. Having considered the evidence I cannot but concur with the trial Magistrate.

There is no way that the Appellant having signed for this money could have casually left it with someone else without the knowledge of his immediate Boss. Moreover what explanation did He have for leaving Ksh.75,000/= in his desk drawer when He had a safe where the money ought to have been kept?

The Appellant's conduct was also suspicious. Though He claimed to have been unwell, there was nothing to show that He was so unwell as to justify his being away from duty for almost one month.

The truth of the matter is that the Appellant absconded having helped himself to the money which was entrusted to him by his employer. It is not surprising that when He was finally made to open the safe the money was found missing.

It is true that there was some discrepancy regarding the actual amount which was stolen. While the charge sheet mentions Ksh.201,133/=:, the evidence was conflicting between Ksh.201,133/= and Ksh.200,133/= as the missing amount. Notwithstanding this, it is evident that at least Ksh.200,133/= was missing. The Appellant was therefore rightly convicted although the amount ought to have been adjusted to Ksh.201,133/=:.

All in all, I am satisfied and do find that the Appellant's conviction was proper. As regards the sentence the Appellant having been treated as a first offender and the amount stolen not having been a colossal amount, the prison term of five years was manifestly excessive. I would accordingly reduce the sentence of five years to a term of three years imprisonment.

The upshot of the above is that the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent of sentence being reduced to three years imprisonment.

Orders accordingly.

Dated, Signed and Delivered this 14th day of January 2004.

*H. M. OKWENGU*

*JUDGE*